

DEPARTMENT OF STATE REVENUE

04-20130234.LOF

Letter of Findings Number: 04-20130234
Sales Tax
For Tax Years 2010 and 2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is suspended by the publication of another document in the Indiana Register.

ISSUES**I. Use Tax – "Like-Kind Exchange."**

Authority: IC § 6-2.5-1-6; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-1-1](#); Sales Tax Information Bulletin 28S (December 2009) and (September 2011).

Taxpayer protests the imposition of use tax on a "like-kind exchange."

II. Use Tax – Materials Used in Landfill "Cell" Construction.

Authority: IC § 6-2.5-4-9; IC § 6-8.1-5-1; [45 IAC 2.2-3-9](#); [45 IAC 2.2-3-8](#).

Taxpayer protests the imposition of use tax on "cell" construction materials.

STATEMENT OF FACTS

Taxpayer is an Indiana landfill. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax compliance for the years 2010 and 2011. As the result of the audit, the Department assessed Taxpayer additional use tax and related interest on certain items it had purchased without paying sales tax at the point of purchase. Taxpayer protested some of the items on which the Department assessed use tax on the basis that items were either exempt from tax or the tax had already been paid. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as necessary.

I. Use Tax – "Like-Kind Exchange."**DISCUSSION**

In 2011, Taxpayer purchased a CAT 740 articulated dump truck for a combination of a cash down payment and an equipment trade. After reviewing the three pieces of equipment traded in for the purchase of the "articulated dump truck," (a CAT grinder and two CAT 627s) the Department's auditor denied the deduction for the trade-ins "due to the fact that it was not a like-kind exchange." Taxpayer agreed that one of the three items, the CAT grinder, did not qualify for the "like-kind" exchange, but disagreed with the Department's treatment of the two CAT 627s. The Department's Audit Summary stated that "the [T]axpayer traded in scrappers and road graders on the purchase of a dump truck" and "[n]either a road grader nor a scraper qualifies as a dump truck" and cited to IC § 6-2.5-1-6 and [45 IAC 2.2-3-20](#) in support of its finding.

Taxpayer protests that the equipment it traded in as part of its purchase of the CAT 740 qualifies as a "like-kind exchange" and is therefore exempt from sales tax and use. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessments are made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state .

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer had not paid sales tax on the portion of the full price of the CAT 740 because an amount was deducted from the sale price based on the value of the two CAT 627s, therefore the Department imposed Indiana use tax on that amount.

Also of relevance is IC § 6-2.5-1-6, which provides:

- (a) "Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:
 - (1) the property exchanged is of the same kind or character, regardless of grade or quality; and
 - (2) the persons exchanging the property both own the property prior to the exchange.
- (b) A "like kind exchange" may be a part of a transaction involving additional consideration other than the exchanged property.
- (c) Notwithstanding subsection (a), a "like kind exchange" does not occur when:
 - (1) the transaction involves more than two (2) persons; or
 - (2) one (1) party to the transaction, through agreement or negotiation with the second party, acquires personal property for the primary purpose of exchanging that property for like kind property held by the second party.

(Emphasis added).

[45 IAC 2.2-1-1](#) states in relevant parts:

- ...
- (k) Like Kind Exchange: Limited to Two Parties. Non-taxable "exchanges" include only transactions for a swap or barter of property between two parties. Property received in an exchange transaction in which a third party is involved, with or without property, is subject to gross retail tax. This rule is not meant to deny non-taxability of exchanges where one or both of the parties in a two-party exchange employ an agent in carrying out the agreement.
- (l) Like Kind Exchange: Property to be Owned by Parties at Time of Exchange. Non-taxable "exchanges" include only transactions in which the property exchanged is owned by the parties thereto at the time the exchange agreement is entered into. Transactions in which the property to be exchanged is acquired by one party after the agreement to exchange has been arranged are taxable. The exchange agreement must specify the definite units or quantity of property to be exchanged. However, "retail merchants" are allowed to consider as non-taxable the full value of tangible personal property of like kind received in allowable exchanges, even though ownership of the property received is encumbered by a conditional sales contract, retail installment contract, or a chattel mortgage.

Taxpayer argues that the exchange should be considered a "like-kind exchange and therefore deductible from the taxable sales price," because "both assets are motorized vehicles used to transport dirt during the operation of the landfill." At the hearing Taxpayer elaborated that both types of vehicles have similar large rubber tires (presumably indicating the function of the vehicles), are of articulated construction (which Taxpayer explained means they pivot independently off the bed) and are used to move dirt at the landfill. According to Taxpayer the CAT 627 scrapers have a pan that drops down to scrape the dirt and the CAT 740 is loaded with an excavator.

Sales Tax Information Bulletin 28S (December 2009), 20100127 Ind. Reg. 045100029NRA), and Sales Tax Information Bulletin 28S (September 28, 2011), 20110928 Ind. Reg. 045110549NRA, the versions of the Information Bulletin 28S in effect during the audit years, provided that:

The deduction for a trade-in allowance applies only to "like-kind exchanges" where the motor vehicle or trailer to be traded in is owned and titled in the name of the customer. A like-kind exchange means a motor vehicle traded for another motor vehicle or a trailer traded for another trailer. A trade-in of a motor vehicle for a trailer is not a "like-kind exchange" and is not deductible in the calculation of the amount of the taxable gross retail income received by the dealer. Non-like-kind exchanges are merely another form of a payment to the dealer and do not reduce the dealer's gross retail income.

As the regulation states and the Information Bulletin elaborates, the property must be "of the same kind or character." For instance, as the Information Bulletin quoted above illustrates, a non-motorized trailer does not qualify for a "like-kind exchange" with a motorized vehicle. In this instance, Taxpayer has met its burden to show that the CAT 627s qualify for "like-kind" exchange with the CAT 740 because both these types of vehicles were used for similar purposes at Taxpayer's landfill. Landfill industry literature points to the fact that in recent years "articulated dump trucks" have replaced "scrapers" to perform similar functions (name of website, <http://www.mswmanagement.com/MSW/Articles/3751.aspx?format=2>, last accessed April 16, 2014). For purposes of the "like-kind exchange" deduction in the taxable retail price of an item, the item does not have to be exactly the same as the item being traded-in, as long as the item being replaced and the item being traded in are generally of the same kind or character.

Based on the above, Taxpayer has met its burden to show that the Department's imposition of use tax on the exchange of the CAT 627s for the CAT 740 was incorrect.

FINDING

Taxpayer's protest to the imposition of sales tax on the "like-kind exchange" is sustained.

II. Use Tax – Materials Used in Landfill "Cell" Construction.

DISCUSSION

The Department's audit assessed use tax on materials used to build a "cell" at Taxpayer's landfill. According to the Department's Audit Summary, "cells" are the areas that landfills build for the disposal of trash. Materials used in the construction of Taxpayer's "cell" included Geotextile liners, pipes, pumps, discharge kits, etc. The Department's Audit determined Taxpayer did not remit sales tax or use tax on these items and therefore assessed use tax based on the retail price of the items. During the audit, Taxpayer stated that these items were purchased pursuant to a lump-sum contract and that the contractor had presumably already paid sales tax on the items when the contractor purchased them for Taxpayer's cell construction project. Taxpayer therefore protested the assessment of use tax on construction materials consumed in a lump-sum contract by its subcontractor.

According to the Department's Audit Summary:

The taxpayer also stated that he will call the vendor to verify that they paid the tax. The auditor requested any documentation that would verify that no additional tax was due on these purchases before the audit was closed. The auditor also pointed out that a 2010 invoice from the same vendor with the same materials had Indiana sales tax charged by the vendor on the selling price of the materials, and the taxpayer did pay the invoice total including the sales tax. The purchase invoices clearly list the purchase of materials only from the vendor [i.e., no sales tax was included]. No lump sum contract was provided, and no documents were provided as evidence that a lump sum contract for an improvement to realty occurred regarding the purchases taxed in the audit. The fact the vendor may have paid tax on some of the cost of their purchases for resale is not relevant, as the vendor must collect tax on the selling price of materials when selling materials at retail.

As a threshold issue, although a statute that imposes a tax is strictly construed against the State, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

Pursuant to IC § 6-2.5-4-9(a):

- (a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:
 - (1) is to be added to a structure or facility by the purchaser; and
 - (2) after its addition to the structure or facility, would become a part of the real estate on which the structure

or facility is located.

[45 IAC 2.2-3-9](#) states in relevant part:

- (a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.
- (b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.
- ...
- (e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:
 - (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
 - (2) He utilizes the construction material for his own benefit; or
 - (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(Emphasis added).

[45 IAC 2.2-3-8](#)(a) states:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.
- (b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [\[45 IAC 2.2-5\]](#)).

Taxpayer asserts that it hired a subcontractor to perform its construction work on a lump-sum basis. Taxpayer mentions that the contractor purchased the construction materials from a vendor to incorporate into real property as part of the lump-sum contract. The invoices Taxpayer presented during the audit and again at the hearing list charges for materials and labor separately. There is no indication on those invoices that sales tax was charged to Taxpayer by the contractor/vendor. Taxpayer did not provide any additional documentation showing that the contractor paid sales tax itself on those items or showing that the contractor remitted use tax to the Department on those items.

Therefore, Taxpayer has not provided sufficient evidence to establish that the construction materials it purchased were not subject to sales and use tax. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest of the imposition of use tax is sustained in part and denied in part. Taxpayer's protest of the imposition of use tax on the "like-kind" exchange of the two CAT 627s is sustained in part as detailed in Issue I. Taxpayer's protest to the imposition of use tax on the materials used in the construction of its "cell" is denied as detailed in Issue II.

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